JURISDICTION.

The order of the court below, sitting as a three-judge district court under 28 U. S. C. §§ 2281 and 2284, granting, after notice and hearing, an interlocutory injunction restraining and enjoining appellant and others from taking any action whatsoever under the Indiana Election Code to conduct a recount of the votes cast for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of the action was entered as of December 17, 1970, at 5:45 P.M. (A. 50-52) The notice of appeal to this Court was filed in the district court on December 18, 1970. The jurisdictional statement was filed in this Court on January 13, 1971. On March 22, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. 28 L. Ed. 2d 321. The jurisdiction of this Court rests on 28 U. S. C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This appeal involves Article 1, § 4, and Article 1, § 5, of the Constitution of the United States, 28 U. S. C. § 2283, and Article 27 of the Indiana Election Code (Acts 1945, Chapter 208, page 860, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866). The pertinent text of these provisions are set forth in Appendix A, *infra*, pages A1-A11.

QUESTIONS PRESENTED.

I. Whether the interlocutory injunction appealed from is prohibited by the plain language of 28 U. S. C. § 2283.

II. If the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, then:

A. Whether appellee Hartke failed to establish that he would suffer irreparable injury if the election recount proceedings in the state courts were not enjoined; and

B. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which makes the Senate the judge of the elections, returns and qualifications of its members.

STATEMENT OF THE CASE.

The material facts, as alleged in appellee Hartke's amended complaint (A. 36-40) and as recited in the opinion of the court below (A. 53-57), are not in dispute.

Appellee R. Vance Hartke and appellant Richard L. Roudebush were candidates for the office of United States Senator at the general election held in the State of Indiana on November 3, 1970. The canvass reflected that appellee Hartke received the highest number of votes cast for such office, and on November 16, 1970, the Secretary of State of Indiana certified him to the Governor of Indiana as duly elected. (A. 36; 53-54)

On November 17, 1970, appellant filed in the Superior Court of Marion County, Indiana, Room 3, a petition wherein he requested a recount of the votes cast for the office of United States Senator in certain specified voting precincts in said county. (A. 8-11) On November 19, 1970, appellee Hartke appeared in said proceeding and filed a motion to dismiss wherein he contended that the court lacked jurisdiction over the subject matter because of the alleged conflict of Article 27 of the Indiana Election Code with Article 1, § 5, of the Constitution of the United States. (A. 12-17) On December 1, 1970, the said court filed an opinion reaching the conclusion that the recount provisions of the Indiana Election Code do not conflict with the Federal or State Constitutions and overruled the motion to dismiss. (A. 18-23) Thereupon, the said court entered an order granting appellant's petition for recount of the votes cast for the office of United States Senator in the general election held on November 3, 1970, in the precincts specified, appointing appellees Samuel Walker, John R. Hammond and Duge Butler as the recount commission, and directing said commission to convene and commence the recount on December 8, 1970. (A. 24-26).[1]

On December 3, 1970, appellee Hartke filed his complaint in the court below wherein he alleged that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of

1. As judicially noticed by the court below (A. 54), appellant filed similar recount petitions in ten other counties of the State of Indiana. The courts involved are the Clark Circuit Court, Grant Superior Court, Lake Circuit Court, Superior Court of Madison County, Pike Circuit Court, Porter Superior Court, Ripley Circuit Court, St. Joseph Superior Court, Vigo Circuit Court and Wayne Circuit Court. Appellee Hartke appeared in each of the ten proceedings and filed a motion to dismiss on the same ground as his motion in the Superior Court of Marion County, Room 3. Prior to the filing by appellee Hartke of his complaint for injunctive relief in the court below, the Lake Circuit Court denied appellee Hartke's motion to dismiss.

United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States. Jurisdiction was predicated on 28 U. S. C. § 1343(3), and appellee Hartke further alleged that appellees Walker, Hammond and Butler, acting under color of state law, would, if not restrained and enjoined, convene and commence a recount of the votes cast for the office of United States Senator in the general election held on November 3, 1970, in the specified precincts in Marion County, thereby depriving appellee Hartke of the rights, privileges and immunities secured to him by Article 1, § 5, of the Constitution of the United States, and that appellant Roudebush, acting under color of state law, would, if not restrained and enjoined, seek to use and utilize the machinery and procedures provided in Article 27 of the Indiana Election Code in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards theretofore made as to what ballots should be counted or not counted, as the case may be. The complaint contains neither an explanation of why appellee Hartke did not seek relief against the recount from the Supreme Court of Indiana nor an allegation of irreparable injury. The prayer of the complaint was that a three-judge district court be convened pursuant to 28 U. S. C. § 2284 to hear and determine the action, that the court declare Article 27 of the Indiana Election Code unconstitutional insofar as it provides a procedure for a recount of the votes cast for the office of United States Senator, and that interlocutory and permanent injunctions be issued restraining and enjoining appellees Walker, Hammond and Butler from convening and commencing a recount and restraining and enjoining appellant Roudebush from taking any actions to effect recount procedures under the Indiana Election Code. (A. 4-7) Upon the filing of the complaint, District Judge

S. Hugh Dillin entered a temporary restraining order without notice. (A. 31-32)[2]

On December 11, 1971, appellee Hartke filed an amended complaint containing the additional allegations that on December 3, 1970, the Governor of Indiana had issued to him a certificate of election, and that on December 4, 1970, said certificate had been delivered to the Clerk of the United States Senate. (A. 37) The amended complaint added an alternative prayer for relief that the court declare that the State of Indiana had divested itself of whatever authority and jurisdiction it may have possessed with respect to the election of a United States Senator by virtue of the certifications by the Governor and Secretary of State of Indiana that appellee Hartke had been elected to that office (A. 39), and a further alternative prayer that the court construe Article 27 of the Indiana Election Code to limit the recount of the votes for the office of United States Senator to a correction of arithmetical errors only and to deny any authority to the recount commissioners, or the court that appointed them, to make any further determination whatsoever as to which ballots should be counted or not counted, as the case might be. (A. 39-40)

On December 15, 1970, appellee Theodore L. Sendak, Attorney General of Indiana, was granted leave to intervene as a defendant. (A. 46)

On December 16, 1970, appellant Roudebush filed a motion to vacate the temporary restraining order on the ground that it was issued in violation of 28 U. S. C. § 2283 (A. 47), and a motion to dismiss the action on the grounds (1) that the court lacked jurisdiction of the subject matter and (2) that the complaint failed to state a claim against appellant upon which relief could be granted. (A. 48-49)

2. Appellee Hartke caused certified copies of the temporary restraining order to be filed in the ten other pending recount proceedings.

On December 17, 1970, appellee Hartke's request for an interlocutory injunction was heard by a three-judge district court composed of District Judges William E. Steckler and S. Hugh Dillin of the United States District Court for the Southern District of Indiana and Circuit Judge John P. Stevens of the United States Court of Appeals for the Seventh Circuit. By a 2-1 vote, the court held Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, to be unconstitutional (A. 53-71), and entered an order granting the interlocutory injunction requested by appellee Hartke. (A. 50-52)

After appellant's appeal was docketed in this Court, appellee Hartke moved to dismiss it on the ground that events occurring after the filing of appellant's jurisdictional statement have rendered the issues raised by the appeal moot. In the memorandum in support of his motion, appellee Hartke contended that appellant did not take any formal action before the United States Senate to contest the right of appellee Hartke to a seat therein, and that, as a result of the swearing in and seating of appellee Hartke on January 21, 1971, the United States Senate judged in favor of him as to the election of November 3, 1970, thus exercising its exclusive prerogative under Article 1, § 5, of the Constitution of the United States and rendering moot the controversy involved in this appeal. On March 22, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. 28 L. Ed. 2d 321.

THE QUESTION OF JURISDICTION.

The Court's order of March 22, 1971, postponing jurisdiction did not advert to the specific point to which counsel should address themselves. Accordingly, appellant will discuss (1) the Court's jurisdiction under 28 U. S. C. § 1253 to entertain this direct appeal from the district court, and (2) appellee Hartke's contention that subsequent events require that the appeal be dismissed as moot.

I. THIS COURT HAS JURISDICTION UNDER 28 U. S. C. § 1253.

The question whether this Court has jurisdiction under 28 U. S. C. § 1253 to entertain this direct appeal rests on whether the three-judge court below was properly convened. *Moody* v. *Flowers*, 387 U. S. 97 (1967).

Although cited neither in appellee Hartke's complaint (A. 38) nor in the opinion of the district court (A. 56-57), the authority to convene the three-judge court in this case would have to rest on 28 U. S. C. § 2281. Said section reads as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Appellant submits that this case meets the requirements of the foregoing statute as interpreted by the decisions of this Court.

First, the complaint below contains requests for interlocutory and permanent injunctions against enforcement of a statute of the State of Indiana. (A. 39)

Secondly, the statute sought to be enjoined must be of general and statewide application. *Moody* v. *Flowers, supra.* In this case, appellee Hartke seeks to enjoin the operation of Article 27 of the Indiana Election Code insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, an office for which votes were cast in all voting precincts of the state. Although appellant has not requested a recount of the votes cast in all of the precincts of the state, he had the right to do so under the statute. As it is, the eleven counties in which he requested recounts are scattered throughout the state. In any event, the recounts in the eleven counties in question could change the outcome of the statewide race for the office of United States Senator.

Thirdly, the officer sought to be enjoined must be a state officer. A three-judge court need not be convened where the action seeks to enjoin a local officer unless he is functioning pursuant to a statewide policy and performing a state function. *Moody* v. *Flowers, supra.* In this case, the duty to enforce or execute the election recount statute is imposed upon the circuit and superior courts of the various counties.[3] By seeking to restrain appellant from taking any actions to effect recount procedures under

3. Most of the duties prescribed by the recount statute are ministerial in nature, although the judge does act judicially in some aspects of the proceeding. See *State, ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943); *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951).

the Indiana recount statute (A. 39), the action thus is directed against the circuit and superior courts whose officers are charged with the execution of such statute. It is immaterial that the injunction is directed against the appellant and not formally against the eleven courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1939); *Donovan* v. *Dallas*, 377 U. S. 408 (1964). The restraint of appellant effectively restrains the courts from executing the statute.[4] If the judges and clerks of the circuit and superior courts, and the recount commissioners appointed by the judges, are to be deemed local officers, they, nevertheless, function pursuant to a statewide policy and perform a state function with respect to the votes cast for the office of United States Senator.

Fourthly, the attack upon the state statute must be based "upon the ground of the unconstitutionality of such statute." In this case, appellee Hartke contends that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States (A. 38), and a majority of the three-judge district court so held. (A. 51)

Finally, irrespective of the existence of all other requirements, the complaint must set forth a cause of action upon which a federal district court can grant relief. A single federal judge has power to dismiss the complaint where it appears that so such relief can be granted. *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237 (1952). In this case, appellant contends that the court below was prohibited

4. Since the injunction also runs against appellees Samuel Walker, John R. Hammond and Dudge Butler, the recount commission appointed by the Superior Court of Marion County, Room 3, such court is directly restrained from proceeding with the recount in Marion County. (A. 39)

from granting injunctive relief by 28 U. S. C. § 2283, and also because there is a lack of equity jurisdiction in that appellee Hartke failed to plead irreparable injury or lack of an adequate remedy in the state courts. Appellant's contentions, of course, were rejected by the district court. If, however, appellant's contentions are correct, then this case is not one required to be heard and determined by a district court of three judges with the result that a direct appeal on the merits would not lie to this Court under 28 U. S. C. § 1253. But such a result would not prevent this Court from accepting jurisdiction of the appeal for the purpose of correcting the error of the district court in entertaining the action. *Bailey* v. *Patterson, supra; United States* v. *Corrick*, 298 U. S. 435 (1936). On the other hand, if appellant is wrong in his contentions regarding the applicability of 28 U. S. C. § 2283 and the lack of equity jurisdiction, then this Court has jurisdiction to reach the merits of the appeal and decide whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States.

II. THE APPEAL IS NOT MOOT.

Contrary to appellee Hartke's contention in support of his motion to dismiss this appeal, the swearing in and seating of him by the United States Senate on January 21, 1971, did not render moot the controversy raised by this appeal. By unanimous consent of the Senate, the oath was administered to appellee Hartke without prejudice to the outcome of this appeal and without prejudice to any recount that might be conducted. The relevant proceedings are recited in 117 Cong. Rec. S4 (daily ed. Jan. 21, 1971), as follows:

"ADMINISTRATION OF OATHS.

"The Vice President. The Senators to be sworn in will present themselves at the desk in groups of four, as their names are called by the clerk in alphabetical order.

"The clerk will call the names.

* * * * * *

"The legislative clerk called the names of Mr. Hartke, Mr. Hruska, Mr. Humphrey, and Mr. Jackson.

"Mr. Curtis. Mr. President, I ask unanimous consent that the oath may be administered to Mr. Hartke, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order; and I further ask unanimous consent that a letter setting forth the details be printed in the Record.

"The Vice President. Without objection, it is so ordered."

The letter mentioned by Senator Curtis, and printed in the Record, makes specific reference to this appeal.

The significance of administering the oath of office to a senator-elect "without prejudice" is explained in Charles L. Watkins and Floyd M. Riddick, *Senate Procedure*, p. 240 (1958), as follows:

> "In recent years various Senators-elect against whom charges or petitions of contest or both were filed, have been sworn in without prejudice to either themselves or the Senate, and then the resolutions to exclude or affirm their membership in the Senate were disposed of by a majority vote at a later date."

For precedents involving the swearing in of senators-elect without prejudice, see *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. (1962) (hereinafter cited as "*Senate*

Cases''). The oath of office was so-administered to William Langer of North Dakota on January 3, 1941 (*Senate Cases*, p. 140), to John Marshall Butler of Maryland on January 3, 1951 (*Senate Cases*, p. 147), and to Dennis Chavez of New Mexico on January 3, 1953. (*Senate Cases*, p. 151)

In the case of William Langer, when he appeared to be sworn, Senator Barkley called the attention of the Senate to certain charges by citizens of North Dakota objecting to the administration of the oath to Langer. Senator Barkley stated that he had read the charges, that the charges referred to Langer's qualifications and fitness, and asked that Langer be permitted to take the oath ''without prejudice, which is a two-sided proposition—without prejudice to the Senator and without prejudice to the Senate.'' Upon parliamentary inquiry, the Vice President explained: ''If this agreement is entered into, only a majority of the Senate will be required to pass on the qualifications of the Senator-elect.'' (*Senate Cases*, pp. 140-141)

In the case of John Marshall Butler, Senator Millard E. Tydings, whom he had defeated, alleged unfair election practices and violation of federal and state election laws in the campaign. The oath was administered to Mr. Butler in accordance with a unanimous resolution, which read as follows:

> ''Mr. McFarland. Mr. President, I ask unanimous consent that when the oath required by the Constitution and prescribed by law is administered to Mr. John Marshall Butler as a Senator from the State of Maryland for the term beginning January 3, 1951, such action shall be deemed to be without prejudice either to him or to the constitutional right or power of the Senate to take any action it may subsequently deem proper, pending the outcome of the investigation now being made by the Committee on Rules and Administration through a subcommittee into the 1950 election in said State.'' (*Senate Cases*, p. 147)

In the case of Dennis Chavez, his defeated opponent, Maj. Gen. Patrick J. Hurley, requested an investigation, contending that the election laws had been violated. On January 3, 1953, Senator Taft requested that Senator Chavez should be permitted to take the oath and be seated without prejudice, and this was done. The contest was not finally disposed of until March 23, 1954. (*Senate Cases,* pp. 151-152)

In the light of the foregoing precedents, the Senate, in administering this oath of office to appellee Hartke without prejudice to the outcome of this appeal and without prejudice to any recount that might be conducted, clearly did not "judge" the election of November 3, 1970, in his favor.

Nor is the matter affected by the fact that appellant has not yet taken formal action before the United States Senate to contest the right of appellee Hartke to a seat therein. Under the Senate precedents, no rights are lost if a contest is not filed until after the oath has been administered to the contestee.

The Introduction to *Senate Cases* contains a discussion of the origin and procedure of contested election cases in the Senate. It is there stated as follows:

> "The Senate has never perfected specific rules for challenging the right of a claimant to serve, inasmuch as each case presents different facts. The practice has been to consider and act upon each case on its own merits, although some general principles have been evolved from the precedents established.
>
> • • • • •
>
> "The usual origin of such cases, however, is by petition. The contestant may file such a petition, protesting the seating of the contestee, and asserting his own right to the seat in question. *It is not required to be filed prior to the swearing-in of the contestee, and no rights are lost if filed afterwards.* • • •" (Emphasis added) (*Senate Cases,* pp. vii-viii)

The Senate cannot be deemed to have judged anything concerning appellee Hartke's right to retain his seat as against appellant until an issue has been presented, considered and voted upon by the Senate. Only then will such matter be deemed *res judicata*. See the cases of Graham N. Fitch and Jesse D. Bright of Indiana (*Senate Cases*, pp. 22-24), Francis W. Sykes v. George E. Spencer of Alabama (*Senate Cases*, pp. 60-61), and Henry A. DuPont of Delaware. (*Senate Cases*, pp. 86-87)

By reason of the foregoing, it is clear that a live controversy continues to exist between the appellant and appellee Hartke. Accordingly, the latter's motion to dismiss this appeal as moot should be denied.

SUMMARY OF ARGUMENT.

The interlocutory injunction issued by the district court should be reversed for three separate and equally valid reasons.

First, the injunction is prohibited by the plain language of 28 U. S. C. § 2283. The court below made no attempt to justify the injunction as falling within one of the three exceptions defined therein. Instead, it held that § 2283 embodies the doctrine of comity and hence is discretionary in its application. Such a view of the statute, however, has been rejected by this Court. Since the injunction appealed from is not expressly authorized by Act of Congress, or necessary in aid of the district court's jurisdiction, or to protect or effectuate its judgments, it cannot be sustained.

Secondly, even if the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, and without

regard to the constitutionality of the recount provisions of the Indiana Election Code, such injunction must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances. No such circumstance is present in this case. Appellee Hartke not only had an opportunity to raise his constitutional claim in the state court proceedings, but he actually interposed the claim. Two courts ruled against him, and he failed to avail himself of the opportunity to obtain immediate review of these rulings by the Supreme Court of Indiana. Nor did appellee Hartke plead or prove that he would suffer irreparable injury if the injunction were not granted. Accordingly, the injunction appealed from violates settled equitable principles and cannot be sustained.

Thirdly, the Indiana recount statute does not conflict with the Senate's prerogative to judge the elections, returns and qualifications of its members.

1. There are essential differences between a recount and a contest under the Indiana Election Code. A recount is mainly a ministerial proceeding whereas a contest is a judicial proceeding. A recount does not finally decide the right to hold the office whereas a contest does. A recount is entirely independent of any kind of judicial review. Basically, the recount proceeding is a means of discovery, and it may or may not be followed by a contest.

2. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is a valid exercise of the power conferred on the State of Indiana by Article 1, § 4, of the Constitution of the United States. The subject matter of Article 1, § 4, is the "times, places and manner of holding elections for Senators and Representatives." This Court has held that these comprehensive words em-

brace authority to provide a complete code for congressional elections, and, therefore, it cannot be doubted that such a code can validly provide a method for a recount of votes as a part of the "manner of holding" the election.

3. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, does not conflict with the provisions of Article 1, § 5, of the Constitution, which makes the Senate the judge of the elections, returns and qualifications of its members. The nature of the power conferred on the House and the Senate by this provision is judicial in character. Hence, it does not encompass election matters that are ministerial in character. The jurisdiction conferred by Article 1, § 5, does not attach until the election conducted pursuant to Article 1, § 4, has been concluded, and such election is not over until a timely petition for a recount of the votes has been disposed of. The Senate itself has impliedly recognized the validity and usefulness of state laws providing for a recount of the votes cast in senatorial elections. In point of fact, recounts of votes cast in congressional elections, conducted pursuant to the authority of state election statutes, have occurred frequently, and the constitutionality thereof have been upheld by various state courts.

ARGUMENT.

I. THE INTERLOCUTORY INJUNCTION APPEALED FROM IS PROHIBITED BY 28 U. S. C. § 2283.

The interlocutory injunction appealed from stays proceedings initiated by appellant in state courts located in eleven Indiana counties. Prior to seeking injunctive relief in the court below, appellee Hartke had appeared in each of the proceedings and filed a motion to dismiss challenging the jurisdiction of the various courts over the subject matter on the ground that the statute under which the courts were proceeding conflicts with Article 1, § 5, of the Constitution of the United States, and two of those courts had denied his motion. Instead of seeking writs of prohibition from the Supreme Court of Indiana to review these rulings, with further review, if necessary, by this Court, appellee Hartke sought relief in the court below.

Although 28 U. S. C. § 2283[5] does not preclude federal court injunctions against the institution of state court proceedings, *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), *Ex parte Young*, 209 U. S. 123 (1908), it most clearly bars all stays of proceedings already instituted, unless the case falls within one of the three exceptions specified therein.[6]

5. The text of this statute is set forth in Appendix A, *infra*, page A1.

6. This is by now too well settled to require extended discussion. The background and policy that led the Congress to pass the original anti-injunction statute in 1793 are discussed in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 129-132 (1941). The statute in its present form dates from the revision of Title 28 of the United States Code in 1948. In *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955), this Court, in

These exceptions permit injunctions to stay proceedings in a state court (1) where the injunction is expressly authorized by Act of Congress, (2) where the injunction is necessary in aid of the court's jurisdiction, and (3) where the injunction is necessary to protect or effectuate the court's judgments.

The court below made no attempt to justify the injunction as falling within one of the three exceptions written into the statute. Relying on a Fourth Circuit case,[7] it said:

> "* * * One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. * * *" (A. 57-58)

Such a view of 28 U. S. C. § 2283 has been rejected by this Court. In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281 (1970), it was said:

> "* * * The respondents here have intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even

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discussing the 1948 revision, said: "By that enactment Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." (Page 514) The Court further said: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." (Pages 515-516) The Court again adhered to this position in *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281 (1970).

7. *Baines* v. *City of Danville,* 337 F. 2d 579 (4th Cir. 1964).

if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. * * *" (398 U. S. at 286-7)

The express holding of this Court in the foregoing case was "that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." (398 U. S. at 287) But this case does not fall within any of said exceptions.

The first exception in § 2283 deals with cases where the Congress has expressly authorized the federal courts to enjoin state court proceedings.[8] There is no suggestion in appellee Hartke's amended complaint that the injunction sought is expressly authorized by Act of Congress. It is merely alleged that the district court has jurisdiction pursuant to 28 U. S. C. § 1343(3).[9] (A. 36) Not only does § 1343(3) not expressly authorize the granting of an injunction to stay proceedings in a state court, but it requires that the action brought pursuant to the jurisdiction conferred be authorized by some other law. The amended complaint contains no citation to any statute that authorized the bringing of the action below.

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8. Examples of the statutory authorization include the various stay provisions contained in the Bankruptcy Act, 11 U. S. C. §§ 11a(15), 29a, 205(j), 403(c), 513, 516(4), 628(3), 714, 772, 814, 828, 877, 907, 1014 and 1062; interpleader cases, 28 U. S. C. § 2361; and habeas corpus cases, 28 U. S. C. § 2251.

9. This section reads as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The opinion of the court below pointed out that 28 U. S. C. § 1343 is the jurisdictional analogue to 42 U. S. C. § 1983.[10] (A. 58) The court later continued:

> "* * * It has been urged in recent cases arising under 42 U. S. C. § 1983 and brought pursuant to 28 U. S. C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by '* * * suit in equity, or other proper proceeding for redress.' Indeed, it has been so held. *Cooper* v. *Hutchison*, 3 Cir., 1950, 184 F. 2d 119. In *Dombrowski, supra*, the Supreme Court found decision of this question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in *Cameron* v. *Johnson*, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182. The proposition therefore remains quite viable." (A. 65-66)

While the court below is correct in stating that the proposition adverted to remains viable,[11] it clearly is not applicable to the case at bar. The action below is not authorized by 42 U. S. C. § 1983, because the rights, privileges and immunities protected by § 1983 are those guaranteed by the Fourteenth Amendment. *Monroe* v. *Pope*, 365 U. S. 167

10. This section reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

11. See the concurring opinion of Mr. Justice Stewart in *Younger* v. *Harris*, ... U. S. ...., 27 L. Ed. 2d 669, 681-682 (1971). For a view that the phrase "suit in equity" does not of itself constitute an express authorization of injunctions against state court proceedings, see Note, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1050-1051 (1965); Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 738 (1961).

(1961);[12] *Johnson* v. *Stevenson*, 170 F. 2d 108 (5th Cir. 1948), *cert. denied sub nom. Stevenson* v. *Johnson*, 336 U. S. 904 (1949).

Inasmuch as the amended complaint alleges that the recount provisions of the Indiana Election Code conflict with Article 1, § 5, of the Constitution of the United States (A. 38), the jurisdiction of the district court to entertain the action can be sustained only under 28 U. S. C. § 1331 (a),[13] if at all. *See, Powell* v. *McCormack*, 395 U. S. 486 (1969). But § 1331(a) contains no provision expressly authorizing an injunction to stay proceedings in a state court.

The second exception in 28 U. S. C. § 2283 permits a federal court to grant an injunction against state court proceedings "where necessary in aid of its jurisdiction."[14] In order for this case to come within the second exception, the court below would have had to have exclusive jurisdic-

12. In the cited case, this Court noted that 42 U. S. C. § 1983 "came onto the books as § 1 of the Klu Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." (365 U. S. at 171)

13. This section reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

14. For example, in *in rem* proceedings a federal court may grant an injunction against proceedings that interfere with the control and disposition of the res. In removal cases, 28 U. S. C. § 1446(e) provides that the state court shall proceed no further unless and until the case is remanded, and the federal court may protect its jurisdiction by injunction. See the Reviser's Note to § 2283. Then there are the statutes that grant jurisdiction to the federal courts, exclusive of the courts of the states. Some examples are found in 28 U. S. C. §§ 1333, 1334, 1338, 1351, 1355, 1356 and 1583. In such instances, where a federal court has exclusive jurisdiction over the subject matter, it may restrain state proceedings that interfere with that jurisdiction.

tion over proceedings for recount of the votes cast for the office of United States Senator from Indiana. Only in such a situation could an injunction staying recount proceedings pending in the eleven Indiana courts be said to be necessary in aid of the district court's jurisdiction. But the district court has no jurisdiction whatsoever over a recount proceeding.

The Indiana Election Code, Burns' Ind. Stat. § 29-5403, specifies that "the candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election." Since Article 1, § 3, of the Constitution of the United States provides that "No Person shall be a Senator * * * who shall not, when elected, be an Inhabitant of that State for which he shall be chosen," a recount proceeding can never be initiated in or removed to a federal district court on the ground of diversity of citizenship.

Appellee Hartke, of course, does not contend that a federal district court has jurisdiction to entertain a recount proceeding under the Indiana Election Code, for his contention is that exclusive jurisdiction over a recount of the votes cast for the office of United States Senator is vested in the Senate itself by virtue of Article 1, § 5, of the Constitution of the United States.[15] But an injunction in aid of the jurisdiction of the United States Senate cannot be deemed to be in aid of the jurisdiction of the district court. In *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511 (1955), it was held that a federal district court was without power, in view of 28 U. S. C. § 2283, to

15. The relevant text is set forth in Appendix A, *infra*, page A1.

enjoin an action pending in a state court on the ground that the National Labor Relations Board had exclusive jurisdiction of the subject matter of the suit. In discussing the exception to § 2283 that permits a federal court to issue injunctions "where necessary in aid of its jurisdiction," this Court said:

> "* * * In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction. Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided." (348 U. S. at 519)[16]

The third exception in 28 U. S. C. § 2283 permits a federal court to grant an injunction against state court proceedings "to protect or effectuate its judgments." In other words, where a federal court has adjudicated a matter, it can protect or effectuate its judgment by enjoining, at the instance of the prevailing party, relitigation of the matter. The party prevailing in the federal court is not obliged to plead his federal judgment in the state court action and, if eventually unsuccessful, seek review of the adverse state judgment. But merely to state this third exception serves to demonstrate that this case does not fall within it. No judgment had been entered by the court below that the court could protect or effectuate.

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16. The Court went on to state that, insofar as protection is needed for the Board's exercise of its jurisdiction, Congress has specifically provided for resort, but only by the Board, to the district court's equity powers. (348 U. S. at 520) By contrast, since there is no statute authorizing the Senate, or its committees, to invoke the district court's equity power in aid of the jurisdiction of the Senate under Article 1, § 5, of the Constitution of the United States, a federal court could not grant injunctive relief even at the request of the Senate itself. See *Reed* v. *County Commissioners*, 277 U. S. 376 (1928).

As heretofore stated, in each of the eleven recount proceedings pending in the courts of Indiana, appellee Hartke filed a motion to dismiss raising the same constitutional question as presented by his complaint below. There is no reason to infer that the state courts are not as fair as the federal courts and as competent to decide the constitutional question presented. It was precisely for this reason that 28 U. S. C. § 2283 was enacted. In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970), this Court said:

> "• • • Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." (398 U. S. at 287)

For the foregoing reasons, the court below lacks jurisdiction over the subject matter of the action, because the injunctive relief sought by the complaint, and which the three-judge court below granted, is squarely prohibited by 28 U. S. C. § 2283.

II. APPELLEE HARTKE FAILED TO ESTABLISH THAT HE WOULD SUFFER IRREPARABLE INJURY IF THE RECOUNT PROCEEDINGS WERE NOT ENJOINED.

Even if the interlocutory injunction appealed from is not prohibited by 28 U. S. C. § 2283, and without regard to the constitutionality of the recount provisions of the Indiana Election Code, the injunction granted by the court below must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.

In *Younger* v. *Harris*, ____ U. S. ____, 27 L. Ed. 2d 669 (1971), this Court noted that, since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. The Court went on to observe that there are two primary sources for this policy: One is the basic doctrine of equity that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The other is the notion of "comity", which is a proper respect for state functions, a recognition of the fact that the entire country is made up of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. The Court then said:

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. * * *" (27 L. Ed. 2d at 676)

The holding of the Court in *Younger* was that a federal court must not enjoin pending state criminal proceedings except under extraordinary circumstances where the danger of irreparable injury is great and immediate, and that the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. The Court further held that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it.[17] No reason suggests itself why

17. In *Samuels* v. *Mackell*, ... U. S. ....., 27 L. Ed. 2d 688 (1971), the Court held that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.

the same equitable principles should not control the case at bar. Although the injunction below was not issued against a state criminal prosecution, the interest of the State of Indiana in the orderly administration of its election laws in no less great than in the orderly administration of the state's criminal laws.

Here appellee Hartke not only had an opportunity to raise his constitutional claim in the state court proceedings, but he actually interposed the claim. Two courts ruled against him, and he had the opportunity to obtain immediate review of these rulings by the Supreme Court of Indiana.[18] Thus, he had an adequate remedy in the state court that precludes federal equitable relief against the pending proceedings.

Moreover, in *Boyle* v. *Landry*, ... U. S. ....., 27 L. Ed. 2d 696 (1971), this Court held that the allegations of the complaint seeking injunctive relief against pending state proceedings must contain a showing of irreparable injury. In the case at bar, neither appellee Hartke's original complaint (A. 4-7) nor his amended complaint (A. 36-40) contains any allegation of any irreparable injury whatsoever. If the injunction in *Boyle* could not be sustained on the basis of allegations that the Court characterized as "flimsy", surely the injunction in the case at bar cannot be sustained in the absence of any allegation at all of irreparable injury.

The district court, however, has attempted to find irreparable injury by a process of reasoning that is specious at best. The majority opinion states:

> "* * * What defendants are threatening to do, and will do if not enjoined, constitutes an interference with

18. Burns' Indiana Statutes § 3-2201 provides:

> "* * * Writs of prohibition may also issue out of the Supreme Court of Indiana to such inferior courts to restrain and confine such inferior courts to their respective lawful jurisdiction."

the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the election contest, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, *i.e.*, that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. *Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed,* hence the frequent reason given for abstention—that all can be made right through state appellate procedures—does not apply." (A. 67) (Emphasis added)

The conclusion of the district court that appellee Hartke will sustain immediate and irreparable damage if the seals on the ballot bags and voting machines are broken cannot be supported.

First of all, the breaking of the seals on the voting machines and the ballots will not, *ipso facto,* compromise the integrity thereof. The recount statute[19] provides that "the court shall by order impound, and provide for the protection of all ballots and voting machines used at such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all per-

19. Burns' Indiana Statutes § 29-5413. Appendix A, *infra,* pages A7-A8.

sons registered by the clerk as having voted for such office or offices." Thus, the court in which the recount petition is filed is empowered to preserve the integrity of the election materials.

Secondly, if appellee Hartke disputes the results of the recount and can establish that the integrity of the election materials was compromised during the recount proceedings, it cannot be doubted that the Senate itself will protect his rights. Neither the original canvass nor the results of a recount are binding on the Senate, since it is the judge of the elections, returns and qualifications of its members. How, then, can appellee Hartke suffer irreparable injury if the seals in question are broken and a recount is conducted?

It is not the recount but the injunction issued by the district court that "constitutes an interference with the orderly processes of the recent election." The right to a recount of the vote is an integral part of the election processes under the Indiana Election Code. No federal court, which has not been reversed, has ever before meddled in the processes for the election of a member of the United States Congress. See *In re Voorhis*, 291 Fed. 673 (S. D. N. Y. 1923); *Keogh* v. *Horner*, 8 F. Supp. 933 (S. D. Ill. 1934); *Johnson* v. *Stevenson*, 170 F. 2d 108 (5th Cir. 1948), *cert. denied sub nom. Stevenson* v. *Johnson*, 336 U. S. 904 (1949); *Peterson* v. *Sears*, 238 F. Supp. 12 (N. D. Iowa 1964); *Manion* v. *Holzman*, 379 F. 2d 843 (7th Cir. 1967), *cert. denied*, 389 U. S. 976 (1967).

To summarize, the injunction appealed from violates settled equitable principles. No showing was made why appellee Hartke could not have obtained relief in the pending state court proceedings or from the Supreme Court of Indiana. Likewise, as a matter of law, no irreparable injury would have resulted to appellee Hartke if the interlocutory injunction had not been granted. The order grant-

ing the injunction, therefore, should be reversed without regard to the constitutionality of Article 27 of the Indiana Election Code.

III. THE INDIANA RECOUNT STATUTE DOES NOT CONFLICT WITH THE SENATE'S PREROGATIVE TO JUDGE THE ELECTIONS, RETURNS AND QUALIFICATIONS OF ITS MEMBERS.

The district court held that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, conflicts with the provisions of Article 1, § 5, of the Constitution of the United States, which makes the Senate the judge of the elections, returns and qualifications of its members. (A. 65) In reaching this conclusion, the court relied on three poorly-reasoned cases involving recounts with respect to elections of members of the Indiana General Assembly. (A. 59-65)[20] Such cases, of course, can-

20. The cases in question are *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838 (151); *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671 (1951); and *State ex rel. Batchelet* v. *DeKalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798 (1967). These cases, purporting to be following the earlier case of *Lucas* v. *McAfee*, 217 Ind. 534, 29 N. E. 2d 403, 588 (1940), hold that a recount of the votes cast for membership in the Indiana General Assembly violates Article 4, § 10, of the Constitution of Indiana, which provides: "Each House • • • shall • • • judge the elections, qualifications and returns of its own members." But *Lucas* does not support such a result. It involved both a recount and a contest. The recount was apparently conducted and concluded without controversy, but it did not change the votes received by the candidates sufficiently to affect the result. The holding of the case, which the court purported to be applying in *Acker*, *Beaman* and *Batchelet*, related to the court's jurisdiction to entertain the contest, not the recount. In *State ex rel. Gramelspacher* v. *Martin Circuit Court*, 231 Ind. 114, 107 N. E. 2d 666 (1952), the court partially retreated from its stand in *Acker* and *Beaman* by holding that a recount under the Indiana Election Code of the results of a primary election for party nomination for representative in the Indiana General Assembly is valid.

not control the constitutionality of the recount statute as it applies to the election of a United States Senator.[21]

With respect to the federal constitutional question, the court below merely stated that "the great weight of authority support's [appellee Hartke's] position that court proceedings for recount or contest with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5, whether brought in state or federal court," and cited cases. (A. 58-59) However, it failed to draw any distinction between a statutory proceeding for a recount of the votes cast and a contest of the election. Such distinction is of controlling importance.

A. A statutory proceeding for recount of the votes cast is not a contest of the election under the Indiana Election Code.

The Indiana Election Code, Burns' Indiana Statutes §§ 29-2801 through 29-6003, is divided into 33 separate articles and covers all phases of the election process. Article 25 thereof, entitled "Counting Votes and Canvassing of Returns," Article 26, entitled "Certificates of Election", and Article 27, entitled "Recounting the Vote," are an integral unit, and together they specify how the results of all elections held pursuant to the Code are determined. The recount provisions of Article 27 are available to all candidates for all offices, including membership in the Senate of

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21. Burns' Indiana Statutes § 29-6001, which is a part of the Indiana Election Code, provides: "If any clause, sentence, paragraph or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof which is directly involved in the controversy in which such judgment shall have been rendered."

the United States.[22] An election is clearly not over until a proper petition for a recount timely filed is disposed of.

A proceeding for a recount of the vote is not an adversary proceeding. The right to the recount is absolute.[23] The candidates affected by the recount do not participate therein except to the extent that "each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present."[24]

Articles 28[25] and 29[26] make provision for the contest of elections. The contest must be for a cause specified in the statute, and any elector who was entitled to vote at the election is entitled to be the contestor.[27] The proceeding is adversary in character, and an appeal from the judgment entered lies to the Supreme Court of Indiana.

The essential differences between a recount and a contest under the Indiana Election Code are discussed in *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951), and in *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943). Those cases point out that a recount is mainly a ministerial proceeding whereas a contest is a judicial proceeding. A recount does not finally decide the right to hold the office whereas a contest does. A recount is entirely independent of any kind of judicial review. Basically, the recount proceeding is a means of discovery, and it may or may not be followed by a contest. In summarizing the effect of the recount procedure, the court in *Pigg* said:

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22. Burns' Indiana Statutes § 29-5402, set out in Appendix A, *infra*, page A2.

23. *Id.* § 29-5401, *infra*, page A2.

24. *Id.* § 29-5411, *infra*, page A7.

25. *Id.* §§ 29-5501 through 29-5508.

26. *Id.* §§ 29-5601 through 29-5617.

27. By contrast, only a candidate can file a petition for a recount under Article 27.

"The canvass and return are to be performed by the commission, a ministerial body, whose count supersedes and is substituted for the canvass and return of another ministerial body, the election board. The statute thus permits a second count (with logical consequences) at leisure, open to the candidates, their 'watchers' and 'representatives of the press,' by persons appointed by a judge who is assumed to be impartial, to supersede the original count made in the haste and excitement of election by boards composed of partisans. All the cost of the recount must be paid by the petitioning candidate or candidates. If the satisfaction of obtaining such a ministerial review is worth the price to the candidate, we see no reason why it should not be granted. If in the course of the proceeding matters are discovered which to either of the parties seems to require judicial review and determination, the remedy of *quo warranto* is available. Unless so reviewed, the result of the recount is final. This does no violence to any principles of public policy nor is it within any inhibition of the Constitution so far as we are now advised." (221 Ind. at 35)

B. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is a valid exercise of the power conferred on the State of Indiana by Article 1, § 4, of the Constitution of the United States.

Article 1, § 4, of the Constitution of the United States provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Article 1, § 4, was a compromise between those delegates to the Constitutional Convention who wanted the States to

have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections.[28] In discussing this provision, *The Federalist No. 59* (Hamilton) states:

> "* * * They [the convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

In discussing the scope of Article 1, § 4, this Court in *Smiley* v. *Holm*, 285 U. S. 355 (1932), said:

> "* * * The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. * * *" (285 U. S. at 366)

While this Court in *Smiley* did not specifically mention recounting the votes after the initial count, the language it used is sufficiently broad enough to indicate that either the States or the Congress could establish a method for a recount of the votes as a part of the "manner of holding" the election.

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28 See footnote 2 to the opinion of Mr. Justice Black announcing the judgment of the Court in *Oregon* v. *Mitchell*, ... U. S. ...., 27 L. Ed. 2d 272 at 278 (1970).

The same conclusion can also be drawn from language in *United States* v. *Classic*, 313 U. S. 299 (1941), where this Court said:

> "* * * The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot. * * *" (313 U. S. at 311-312)

The very purpose of Article 27 of the Indiana Election Code, in providing for "Recounting the Vote," is to insure that the votes cast are correctly recorded and certified. Accordingly, since the States have been given the authority by Article 1, § 4, to prescribe all steps necessary to complete the elective process, subject to the overriding power of Congress to alter such regulations, it cannot be doubted that either the Senate or the House would accept the final tally of the vote for Senator or Representative after a recount as well as it would accept the original tally without a recount.

C. Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, does not conflict with the provisions of Article 1, § 5, of the Constitution, which makes the Senate the judge of the elections, returns and qualifications of its members.

There does not seem to have been any discussion concerning Article 1, § 5, of the Constitution of the United States[29]

29. The relevant text is set forth in Appendix A, *infra*, page A1.

in the Constitutional Convention.[30] But the nature of the power conferred on the House and Senate by this provision is judicial in character. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597 (1929). Accordingly, it should not be extended to encompass election matters that are merely ministerial in character.

In holding that Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of the votes cast for the office of United States Senator, is in conflict with Article 1, § 5, of the Constitution of the United States, the court below has misapplied that provision of the Constitution. Article 1, § 5, says that each house shall be the *judge* of the elections, returns and qualifications of its own members. It does not say that each house shall *count* the votes cast at such election, a ministerial function. Indeed, if the district court's position that Article 1, § 5, forbids a recount of votes for members of the United States Senate were to be accepted, then it logically follows that it forbids the initial count of such votes as well. The State's jurisdiction under Article 1, § 4, to prescribe the "manner of holding elections" would end once the polls were closed, and the Senate would have to tally the vote. But the Constitution does not contemplate such an absurdity. The jurisdiction conferred on the Senate by Article 1, § 5, does not attach until the election conducted pursuant to Article 1, § 4, has been concluded, and such election is not over until

30. This provision apparently had its origin in the practice of the House of Commons of the British Parliament. In the reign of Elizabeth I the Commons claimed the right to determine questions of disputed elections, and in 1604, during the reign of James I, they insisted upon it. Although the Commons exercised this jurisdiction for more than 250 years, its experience was not satisfactory, and in 1868 its jurisdiction to decide questions of controverted elections was assigned by 31 & 32 Vict. c. 125 to the courts of law. See, Sir William R. Anson, *The Law and Custom of the Constitution, Part 1, Parliament* (3rd Ed. 1897), pages 162-166.

a timely petition for a recount of the votes has been disposed of.

The Senate itself has impliedly recognized the validity and usefulness of state laws providing for a recount of the votes cast in Senatorial elections. In the case of *Herbert R. O'Conor* v. *D. John Markey* of Maryland (*Senate Cases*, pp. 144-145), which arose out of the election of November 5, 1946, a recount of the votes cast was conducted by the Subcommittee on Privileges and Elections. In the report submitted by the full Committee on Rules and Administration,[31] it was pointed out that the recount was conducted because Maryland law made no provision therefor. The said report states:

> "* * * In view of the fact that 'the laws of Maryland make no provision for a recount of votes cast in a general election for United States Senator,' contestant requested 'the Senate to employ its power and authority for the purpose of effecting a fair and lawful recount of all ballots cast at said election.'
>
> * * * * *
>
> "*The special committee, having first ascertained that the laws of the State of Maryland did not, in fact, provide for a recount as desired by contestant,* forthwith dispatched investigators to make a verification check on all voting machines used in that election in the State of Maryland. * * *" (Emphasis added) (Pages 1-2)

The implication from the foregoing statement is clear that, if Maryland law had made provision for a recount, it would have been unnecessary for the Senate to conduct the recount, and that a recount pursuant to the state law would have been proper.

In point of fact, recounts of votes cast in Congressional elections, conducted pursuant to the authority of state elec-

31. S. Rept. No. 1284, 80th Cong., 2d Sess. (1948).

tion statutes, have occurred frequently. One that was widely covered by the media arose out of the general election held on November 5, 1968, when Robert Packwood defeated Wayne Morse for the office of United States Senator from Oregon. Morse sought a recount of the votes under the Oregon election laws, and the same was had. Apparently, no reported challenge was made to the legality of the recount proceeding.

A recount was also had after the Nevada senatorial election of 1964, as appears from the case of *Laxalt* v. *Cannon*, 80 Nev. 588, 397 P. 2d 466 (1964). That case involved an election contest, which was dismissed by the court on the ground that exclusive jurisdiction was vested in the United States Senate under Article 1, § 5, of the Constitution. However, it appears from the opinion that, prior to the filing of the contest, a recount had been conducted without objection. In this regard, the opinion states:

> "* * * The Canvass showed Cannon to have won the election by a narrow margin. *Laxalt made timely demand for a recount of the vote (NRS 293.403), and a statewide recount was conducted over a three-day period and completed on December 2, 1964. The recount also showed Cannon to have won the election by a narrow margin, though slightly greater than before.* On December 3, 1964, Laxalt filed a statement of contest with this court (NRS 293.407). On December 4, 1964, Governor Sawyer issued a certificate of election to Senator Cannon (NRS 293.395 (3)). Subsequently, Senator Cannon filed a motion to dismiss this election contest, contending that this court does not have jurisdiction to decide it. * * *" (Emphasis added) (397 P. 2d at 466)

The validity of state recount statutes have been specifically upheld in cases involving elections to the House of Representatives of the United States Congress. In *Wickersham* v. *State Election Board*, 357 P. 2d 421 (Okla.

1960), the Supreme Court of Oklahoma, in a well-reasoned opinion, said:

> "We are of the opinion that, where the right to a recount of votes cast for a particular office is not granted by statute, a proceeding that has for its purpose the matter of recounting the votes in fact 'constitutes a challenge to the title to the office' (at page 760, 85 P. 2d) and is therefore an action in the nature of quo warranto to try the right or title to the office. In such cases all of the election processes have been carried out before the proceeding is filed and for said reason Congress alone has exclusive jurisdiction and it alone can grant relief. On the other hand, *where, as a part of the election proceedings, a recount is provided for in proper instances, an election cannot be considered as over or final until a recount is allowed, and until the election is final, the courts can and should exercise jurisdiction for the purpose of requiring the lower tribunals to comply with the election statutes.* • • •
>
> "In view of the fact that our recount statute (Sec. 392, supra) is an integral part of our election laws, and in view of the further fact that an election in our opinion is not over or final until a proper application for a recount timely filed is disposed of, *there are no substantial grounds for distinguishing the right to a recount in a proper case from a right to a count of the votes in the first instance.*
>
> "Respondents and intervenor contend that since Congress, under the provisions of Art. 1, Sec. 5, supra, is the ultimate judge 'of its own Members' it may refuse to seat petitioner notwithstanding a recount of the votes may show that he in fact received more votes than Wheeler. Although Congress may have such power, we do not agree with respondents' suggestion that to accept jurisdiction herein and grant relief we will be doing a vain or futile thing. We are not convinced that Congress will refuse to recognize the result of a recount or a Certificate of Election issued in accordance with the recount. • • •" (357 P. 2d at 424-5) (Emphasis added)

Similar views were expressed in the concurring opinions in *Odegard* v. *Olson*, 264 Minn. 439, 119 N. W. 2d 717 (1963). In that case the petitioner had commenced proceedings to contest the election for the office of U. S. Representative pursuant to the provisions of 2 U. S. C. §§ 201 through 226, and then sought an injunction in the Supreme Court of Minnesota to prevent the secretary of state of Minnesota from issuing a certificate of election to his opponent pending final determination of the contest in the U. S. House of Representatives. The court held that it had no jurisdiction to issue the injunction. In concurring, Chief Justice Knutson pointed out that, although Minnesota did not have a recount statute, it had the constitutional power to enact one, saying:

> "U. S. Const. art. I, § 4, which provides that the 'Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,' clearly grants to the states the power to prescribe the manner of electing Senators and Representatives to Congress. This right, however, is circumscribed by art. I, § 5, which reads in part: 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.' By legislation, Minnesota, as well as every other state of the Union, has provided the machinery for electing members of Congress. In view of that fact, it is not accurate to say that we have no jurisdiction over elections. *It is more proper to say that the states have been given the authority to prescribe all steps necessary to complete the elective process, subject to the overriding power of Congress to determine who has been properly elected and to refuse to seat one who is determined not to have been properly elected. Within the scope of the elective process, our legislature could have provided for a recount of the votes under supervision of our courts when the original tabulation was questioned by one of the*

candidates. If it had done so as part of the elective process, as many of the other states have done we do not doubt that Congress would accept the final tally of the vote after a recount as well as it would accept the original tally without a recount.'' (Emphasis added) (119 N. W. 2d at 721)

Blackburn v. *Hall*, 115 Ga. App. 235, 154 S. E. 2d 392 (1967), upheld the recount procedure under the Georgia Election Code as applied to the election of a representative to the United States Congress. The court adopted and followed the reasoning of the Supreme Court of Oklahoma in *Wickersham* v. *State Election Board, supra.*

Accord, Rice v. *Power*, 19 N. Y. 2d 196, 224 N. E. 2d 865 (1967) (involving election for office of delegate to the New York Constitutional Convention).

In the light of the foregoing authority, it is clear that the recount provisions of the Indiana Election Code are valid and constitutional as applied to the election of a United States Senator.

CONCLUSION.

The order of the district court granting the interlocutory injunction appealed from should be reversed and the cause remanded to the district court with directions to dismiss the action.

Respectfully submitted,

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APPENDIX A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent text of Article 1, § 4, of the Constitution of the United States reads as follows:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

The pertinent text of Article 1, § 5, of the Constitution of the United States reads as follows:

> "Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * *."

The text of 28 U. S. C. § 2283 reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The text of Article 27 of the Indiana Election Code (Acts 1945, Chapter 208, page 680, at pages 883 to 890, as amended by Acts 1961, Chapter 313, page 861, at pages 862 to 866), as it appears in Burns' Indiana Statutes, §§ 29-5401 through 29-5417, reads as follows:

Article 27—Recounting the Vote.

29-5401. Elections—Right of candidate to recount of votes.—Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county of counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401—29-5417] provided. [Acts 1945, ch. 208, § 324, p. 680.]

29-5402. Right of recount—Candidates entitled—Application to voting precincts.—The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipality, county, district, judicial, legislative, and state elective office and candidates for membership in the House of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate. [Acts 1945, ch. 208, § 325, p. 680.]

29-5403. Petition for recount—Verification—Filing—Cross-petition by candidate elected—Time in which cross-petition must be filed.—The candidate desiring a recount of votes shall file a verified petition or petitions therefor, as the case may be, in the circuit or in a superior court of the county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election, or before the judge of any such court in vacation and each such petition shall specify the voting precinct or precincts within the county in which the petition is filed in which such recount is desired; such

petitions for the recount of votes cast at an election shall be filed within fifteen [15] days after the day on which such election was held: Provided, That any candidate, who, on the face of the election returns is elected to any office at such election, shall be permitted to file a cross-petition or cross-petitions for a recount within twenty-five [25] days after the day on which said election is held and each such cross-petition shall specify the voting precinct or precincts within the county in which the cross-petition is filed in which such recount is desired. If a petition for recount is filed for an office for which voters in more than one county vote a cross-petition for a recount may be filed in a county or counties in addition to the one in which the first petition was filed: Provided, That such cross-petition or cross-petitions for a recount shall be filed within twenty-five [25] days after the day on which said election is held and that such cross-petition or cross-petitions shall ask for a recount of all votes cast for such office in the second or more counties; Provided, further, That in the case of a state-wide elective office, if more than two [2] counties are involved through petition or cross-petition, the petitioner and cross-petitioner shall each bear ten per cent [10] of the costs occasioned by the recount, and the remainder of said cost shall be appropriated and paid from the general fund as other expenditures of the state of Indiana, notwithstanding any other provisions of the Acts of 1945, chapter 208. If on either such day the court shall be in vacation the petition or cross-petition shall be deemed duly filed in time if filed in the office of the clerk of the court, but no such petition shall be granted and no recount ordered until after such twenty-fifth day following such election unless the defendant or defendants to the petition or petitions file a written waiver or waivers of their right to file a cross-petition or cross-petitions as provided in this article [§§ 29-5401—29-5417]: Provided, further, That the filing of a cross-petition is discretionary and not obligatory and failure to file either a cross-petition or an answer shall

not be construed as an admission of the truth of the allegations of the petition for a recount nor shall it give rise to any presumption in favor thereof. [Acts 1945, ch. 208, § 326, p. 680; 1961, ch. 313, § 2, p. 861.]

29-5404. Candidates may join in petition for recount —Consolidation of petitions for recount.—Two [2] or more candidates for the same or different offices voted upon at the same election may join in such petition or petitions for recount. If more than one [1] petition for recount is filed in any county within fifteen [15] days following an election, whether in the same court of such county or not, such petitions shall be ordered consolidated under the petition first filed, and if a transfer of petitions from one court of such county to another court of such county is necessary to effect such consolidation such transfer shall on motion be ordered by the court in which the subsequent petition or petitions were filed, or the judge thereof in vacation. [Acts 1945, ch. 208, § 327, p. 680.]

29-5405. Petition for recount — Contents — Term "contest" defined—Amendment of petition.—Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of petitioner's opposing candidate or candidates; that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, or that the petitioner desires to prepare for a contest in respect of such office which he has reason to believe will be instituted against him; and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term "contest" as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office.

The court in which such petition is filed or the judge thereof in vacation may allow such petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 328, p. 680.]

29-5406. Cross-petition—Contents—Amendment of cross-petition.—Each such cross-petition shall state the office and the precinct or precincts within the county in respect of which the cross-petitioner desires a recount; that he was a candidate at such election for such office and that the office was voted upon in the precinct or precincts specified; the name and post-office address of the cross-petitioner's opposing candidate or candidates; that the cross-petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that he desires a recount of all of the votes cast for such office in such precinct or precincts. The court in which such cross-petition is filed or the judge thereof in vacation may allow such cross-petition to be amended at any time upon such terms and conditions as the court or judge may order. [Acts 1945, ch. 208, § 329, p. 680.]

29-5407. Notice of filing and pendency of petition—Duty of clerk to issue notice—Duty of sheriff.—Upon the filing of such petition, the clerk shall issue a notice of such filing and pendency of such petition to the opposing candidate or candidates and deliver the same to the sheriff or sheriffs of the county or counties in which such opposing candidate or candidates reside; and said sheriff or sheriffs shall immediately serve the same upon such opposing candidate or candidates in person or by leaving a copy at his or their last and usual place of residence and shall make immediate return of such service. [Acts 1945, ch. 208, § 330, p. 680.]

29-5408. Bond for payment of costs.—Each petitioner shall furnish a cash deposit or file an undertaking with corporate surety to the approval of the

court for the payment of all costs of such recount, the minimum amount of which shall be one hundred [$100] dollars. Should the number of precincts to be counted exceed ten [10], the amount of the deposit or bond, as the case may be, shall be increased by ten dollars [$10] for each and every precinct in excess of ten [10]. Any unexpended balance remaining in any deposit after payment of all the costs occasioned by the recount proceedings shall be returned to the depositor: Provided, That where the petition is joint a joint undertaking may be furnished: Provided, however, That in the event a cross-petition is filed then the petitioner or petitioners and the cross-petitioner or cross-petitioners shall either furnish cash deposits or file undertakings with corporate surety to the approval of the court for the payment of his or their proportionate share of the cost of such recount as hereinafter provided: Provided, That where the cross-petition is joint a joint undertaking may be furnished. [Acts 1945, ch. 208, § 331, p. 680.]

29-5409. Granting petition and cross-petition—Appointment of recount commission.—Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts, and if there is a consolidation of such petitions and cross-petitions, the court shall by consolidated order grant such consolidated petitions and cross-petitions and shall order a consolidated recount of all votes in all precincts in such county specified and requested in such petitions and cross-petitions. In either case the court or the judge thereof in vacation shall appoint a recount commission of three [3] members to make the recount or recounts ordered, and the commission shall in the same process recount all of the votes ordered recounted. [Acts 1945, ch. 208, § 332, p. 680.]

29-5410. Recount commission — Qualifications of members—Compensation.—If any of the votes to be recounted were cast by means of voting machines, one [1] member of the recount commission shall be a competent mechanic who is familiar with such voting machines. All of such commissioners shall be voters, qualified to vote at such election and two [2] of such commissioners shall be selected from the two [2] opposite political parties which cast the highest and next highest votes in this state for secretary of state at the last preceding general election. Each member of the commission shall receive ten dollars [$10.00] for each day while actually engaged in making such recount. The cost of such recount shall be paid by each petitioner or cross-petitioner, as hereinafter provided. [Acts 1945, ch. 208, § 333, p. 680.]

29-5411. Duty of commission—Watchers—Representatives of press entitled to attend.—On a day, not sooner than five [5] days after the recount is ordered, and at a place to be fixed by order of the court, such commission shall convene and commence such recount and shall expeditiously complete the same. Each candidate affected by such recount shall be entitled to have a watcher present at such recount and shall himself have the right to be present. Representatives of the press shall also be entitled to attend such recount. [Acts 1945, ch. 208, § 334, p. 680.]

29-5412. Duty of clerk when order of recount is made and entered by court.—On the day when the order of recount is made and entered by the court, the clerk of the circuit court shall, by registered United States mail, mail a certified copy of such order to each opposing candidate named in such petition at the address therein given, and shall tax the cost thereof to the petitioner. [Acts 1945, ch. 208, § 335, p. 680.]

29-5413. Protection of ballots, voting machines, tally sheets and other papers—Duty of court.—The court shall by order impound, and provide for the protection of all ballots and voting machines used at

such election for casting votes for such office or offices in such precinct or precincts, together with all tally sheets relating thereto and all lists of the names and addresses of all persons registered by the clerk as having voted for such office or offices, and shall make the same available to said recount commission or to any contest commission appointed pursuant to section 351 [§ 29-5603] (a) (b) and (c) of this act [chs. 28-60 of this title]. [Acts 1945, ch. 208, § 336, p. 680; 1961, ch. 313, § 3, p. 861.]

29-5414. Completion of recount—Certificate of commission—Filing—Duty of clerk—Effect of certificate—Procedure when recount for office of governor, lieutenant-governor, and members of general assembly.—When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

Except for the offices of governor, lieutenant-governor, and members of the general assembly, such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding [proceeding] in which there is an issue as to the votes cast at such election for such office or offices.

Upon a recount for the office of governor or lieutenant-governor, each clerk of the circuit court shall, on the day following the completion of the recount, make out, at full length, two [2] certified statements, under the seal of the clerk of the circuit court, of the number of votes each candidate received; one [1] of which he shall transmit to the speaker of the house of repre-

sentatives of the next general assembly, by its senator or representative, who shall deliver the same to such speaker on the first day of the session and the other certified statement shall be transmitted by registered mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on the first day of the session.

If a recount is had in respect to votes cast for senator or representative in the general assembly, each clerk of the circuit court, on the day following the completion of the recount, shall make and certify two [2] statements showing the total number of votes each candidate received; he shall transmit one [1] such certified statement to the person having the highest number of votes for senator or representative, and shall transmit one [1] certified statement to the presiding officer of the house in which the successful candidate is to be seated, directed to the care of the secretary of state, by whom the same shall be delivered to the said presiding officer on the first day of the next session of the general assembly. The said certified statement shall be referred by such presiding officer for such action as that body may find appropriate: Provided, however, That when two [2] or more counties compose a district to elect a senator or representative, the clerks of such counties shall meet on Wednesday next following the day such recount is completed between the hours of one [1] and six [6] of the afternoon, at the courthouse of the oldest county in such district, where they shall compare the recount certificates filed with them and shall jointly make out and certify two [2] statements showing the total number of votes each candidate received and shall transmit the same as provided herein.

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities. [Acts 1945, ch. 208, § 337, p. 680; 1961, ch. 313, § 4, p. 861.]

29-5415. Recount in respect to office for which votes were cast in all voting precincts of state—Duty of clerk to certify recount vote to secretary of state—Duty of secretary of state.—If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, except governor and lieutenant-governor, or in more than one [1] county, except members of the general assembly, the clerk of the circuit court where such recount was had shall determine whether the votes as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state who then shall tabulate the vote for such office from such county in accordance with such certificate from such clerk; and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, in accordance with such certificate from such clerk and the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office. [Acts 1945, ch. 208, § 338, p. 680; 1961, ch. 313, § 5, p. 861.]

29-5416. Recount in respect to office voted upon in single county, city or smaller unit—Duty of clerk.—If the office in respect to which such recount is had was voted upon only in a single county, except members of the general assembly, city, or smaller unit, then the clerk of the circuit court shall determine whether the total tabulation of all votes for such office as made by the county canvassing board authorized to make such total tabulation is affected by the results of such re-

count as shown by such recount certificate, and if it is, then such clerk shall make his certificate showing the correct total vote for such office in accordance with such recount certificate and shall transmit such certificate to the county election board or such other officer as may be authorized by this act [chs. 28-60 of this title] to issue a certificate of election or commission for such office; and the candidate shown by such certificate of the clerk to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office, notwithstanding one may have been issued upon a previous return or certificate of the total votes cast for such office. [Acts 1945, ch. 208, § 339, p. 680; 1961, ch. 313, § 6, p. 861.]

29-5417. Payment of costs of recount—Time.—In those cases in which no cash deposit is made as provided in section three hundred and thirty-one [§ 29-5408], the petitioner or petitioners shall pay all of the costs occasioned by the recount to the clerk of the circuit court within ten [10] days after the recount has been finally completed: Provided, however, That in the event a cross-petition or cross-petitions are filed then the party or parties filing such cross-petition or cross-petitions shall pay to the clerk of the circuit court of the county in which such recount is had within ten [10] days after the recount is completed all of the costs occasioned by the recount of votes in the precinct or precincts which have been designated in his or their respective cross-petition or cross-petitions and the petitioner or petitioners shall be relieved of these costs of the recount. [Acts 1945, ch. 208, § 340, p. 680.]